A **JIGARLAL KANTILAL DOSHI**

v.

AMANAH RAYA BHD

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEAL NO: 02-24-2010(J)]
C 10 OCTOBER 2011

CIVIL PROCEDURE: *Administration of estates - Grant of probate - Setting aside - Application for - Whether administrator of estate could petition for grant of probate under Public Trust Corporation Act 1995 -*
D *Whether a grant of probate in breach of court order - Act done in disobedience of a court order an invalid act - A valid caveat in force before the grant - Legal effect of caveat - Whether grant made in defiance of a caveat a nullity - Whether grant set aside - Probate and Administration Act 1959, s. 33 - Rules of the High Court 1980, O. 71*
E *r. 37*

SUCCESSION: *Administration of estates - Grant of probate - Whether administrator of estate could petition for grant of probate under Public Trust Corporation Act 1995 - Whether a grant of probate in breach of*
F *court order - Act done in disobedience of a court order an invalid act - A valid caveat in force before the grant - Legal effect of caveat - Whether grant made in defiance of a caveat a nullity - Whether grant set aside - Probate and Administration Act 1959, s. 33 - Rules of the High Court 1980, O. 71 r. 37*

G ***SUCCESSION:*** *Probate - Grant of - Setting aside - Application for - Whether administrator of estate could petition for grant of probate under Public Trust Corporation Act 1995 - Whether a grant of probate in breach of court order - Act done in disobedience of a court order an invalid act - A valid caveat in force before the grant - Legal effect of*
H *caveat - Whether grant made in defiance of a caveat a nullity - Whether grant set aside - Probate and Administration Act 1959, s. 33 - Rules of the High Court 1980, O. 71 r. 37*

SUCCESSION: *Letters of administration - Caveat - A valid caveat*
I *in force before grant of probate - Legal effect of caveat - Whether grant made in defiance of a caveat a nullity - Whether grant should be set aside - Probate and Administration Act 1959, s. 33 - Rules of the High Court 1980, O. 71 r. 37*

The deceased died on 1 July 1991, leaving a will in which his wife and his youngest son were named as executrix and executor respectively of the deceased's estate ('the then executrix and executor') and a probate was granted in favour of them. On 17 September 1994, the appellant filed a notice of motion for an order that the grant of probate granted by the High Court to the then executrix and executor be revoked. The High Court allowed the application. The Court of Appeal affirmed the order of the High Court and the respondent (ARB) was duly appointed as the administrator of the estate pursuant to Public Trust Corporation Act 1995. On 1 November 2007, a notice of caveat was entered by the appellant against the estate of the deceased. On 4 January 2008, a grant of probate was issued to ARB. The appellant contended that the issuance of the said grant of probate was made without any notice given to the appellant. The appellant then filed an originating summons ('the present action') applying for an order that the grant of probate dated 4 January 2008 to the ARB be set aside on the grounds that the said probate was wrongfully and unlawfully issued. The appellant's application was dismissed by the High Court and the Court of Appeal. The appellant filed a notice of motion to the Federal Court for leave to appeal against the decision of the Court of Appeal, essentially challenging the validity of the grant of probate to ARB. Leave to appeal was allowed on the following questions of law (i) whether the ARB could petition for grant of probate under the Public Trust Corporation Act 1995 when appointed only as an administrator and (ii) whether a grant of probate was a nullity when caveat against a grant was in force.

Held (allowing the appeal)
Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) The application for the grant of probate was made by the ARB acting pursuant to its powers under s. 13(1) of the Public Trust Corporation Act. The ARB should have applied for a grant of administration instead, and not as it did here for a grant of probate. The grant of probate in this instance had been in breach of the order of the Court of Appeal, which had appointed ARB as an administrator. An act done in disobedience of a court order as happened here, was an invalid act; and it could not affect any change in the rights and liabilities of others. (*Clarke & Ors v. Chadburn and Ors*). (paras 13 & 14)

(2) The Court of Appeal had failed to appreciate the distinction between an appointment and a grant. It is the grant that clothes the personal representative with a title upon its issue by the Registry under the seal of the court. The administrator derives his title from the grant and cannot act until then (*P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors*). Herein, a valid caveat was in force before the grant and to ignore the caveat was clearly wrong. The legal effect of a caveat is actually a notice to the court not to allow proceedings to be taken without notice to the caveator, and not merely as a notice to the caveator as was wrongly held by the Court of Appeal. A caveat is thus not merely a notice to a particular person; it is a general notice to the court not to allow proceedings to be taken without notice to the caveator (s. 33 of the Probate and Administration Act 1959). Thus, a grant made in defiance of a caveat would be a nullity. The grant here should have been set aside and the matter corrected pursuant to the procedures set out under O. 71 r. 37 Rules of the High Court 1980 since clearly here a caveat was in existence. (paras 19 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Simati telah meninggal dunia pada 1 Julai 1991, meninggal satu wasiat di mana isteri dan anak lelaki bongsunya dinamakan sebagai wali dan wasi masing-masing estet simati ('wali dan wasi ketika itu') dan probet dikeluarkan kepada mereka. Pada 17 September 1994, perayu telah memfailkan notis usul untuk perintah bahawa geran probet yang diberi oleh Mahkamah Tinggi kepada wali dan wasi ketika itu dibatalkan. Mahkamah Tinggi telah membenarkan permohonan tersebut. Mahkamah Rayuan mengesahkan perintah Mahkamah Tinggi dan responden (ARB) telah dilantik sebagai pentadbir estet itu di bawah Akta Perbadanan Amanah Rakyat 1995. Pada 1 November 2007, notis kaveat dimasuki oleh perayu terhadap estet simati. Pada 4 Januari 2008, geran probet telah diberikan kepada ARB. Perayu berhujah bahawa pengeluaran pemberian probet tersebut dibuat tanpa notis diberi kepada perayu. Perayu kemudiannya memfailkan saman pemula ('tindakan ini') memohon perintah bahawa geran probet bertarikh 4 Januari 2008 kepada ARB diketepikan atas alasan-alasan bahawa geran probet tersebut dibuat dengan salah dan menyalahi undang-undang. Permohonan perayu telah ditolak oleh Mahkamah Tinggi dan Mahkamah Rayuan. Perayu memfailkan notis usul kepada Mahkamah Persekutuan untuk kebenaran membuat rayuan

terhadap keputusan Mahkamah Rayuan, yang pada dasarnya mencabar kesahihan geran probet kepada ARB. Kebenaran untuk merayu dibenarkan atas persoalan undang-undang berikut (i) sama ada ARB boleh membuat petisyen untuk geran probet di bawah Akta Perbadanan Amanah Rakyat 1995 apabila hanya dilantik sebagai pentadbir dan (ii) sama ada geran probet sepatutnya dibatalkan apabila kaveat terhadap geran adalah dikuatkuasakan.

Diputuskan (membenarkan rayuan)
Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Permohonan geran probet dibuat oleh ARB yang bertindak mengikut kuasa-kuasanya di bawah s. 13(1) Akta Perbadanan Amanah Rakyat. ARB sepatutnya memohon untuk geran pentadbiran, dan bukannya untuk geran probet. Geran probet di sini telah melanggar perintah Mahkamah Rayuan, yang telah melantik ARB sebagai pentadbir. Tindakan yang dibuat di dalam ketidaktaatan perintah mahkamah seperti yang berlaku di sini, adalah tindakan yang tidak sah; dan ia tidak boleh mempengaruhi apa-apa perubahan di dalam hak-hak dan tanggungjawab-tanggungjawab pihak yang lain (*Clarke & Ors v. Chadburn & Ors*).

(2) Mahkamah Rayuan telah gagal melihat perbezaan di antara perlantikan dan geran. Ia adalah geran yang menyarung wakil peribadi dengan hakmilik apabila ia dikeluarkan oleh pejabat pendaftaran di bawah meterai mahkamah. Pentadbir memperolehi hakmiliknya dari geran dan tidak boleh bertindak sehingga itu (*P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors*). Di sini, kaveat yang sah dikuatkuasakan sebelum geran dan untuk mengabaikan kaveat adalah dengan jelasnya salah. Kesan undang-undang kaveat adalah notis kepada mahkamah untuk tidak membenarkan prosiding-prosiding diambil tanpa notis kepada pengkaveat, dan bukan semata-mata notis untuk pengkaveat seperti yang salah diputuskan oleh Mahkamah Rayuan. Oleh itu kaveat bukan semata-mata notis kepada orang tertentu; ia adalah notis am kepada mahkamah untuk tidak membenarkan prosiding-prosiding diambil tanpa notis kepada pengkaveat (s. 33 Akta Probet dan Pentadbiran 1959). Oleh itu, geran yang dibuat dalam bantahan satu kaveat sepatutnya dibatalkan. Geran di sini sepatutnya

A diketepikan dan perkara diperbetulkan selaras dengan prosedur-prosedur yang dinyatakan di bawah A. 71 k. 37 Kaedah-Kaedah Mahkamah Tinggi 1980 kerana dengan jelasnya di sini kaveat memang wujud.

B **Case(s) referred to:**
Aly and Another v. Aly [1984] 128 Sol J 65 ***(refd)***
Clarke & Ors v. Chadburn and Ors [1985] 1 All ER 211 ***(refd)***
Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1998] 4 CLJ 81 CA ***(refd)***
Kok Song Kong v. BSP Co Sdn Bhd [1988] 1 LNS 31 CA ***(refd)***
C *L Narain v. Union of India AIR [1976] SC 715* ***(refd)***
Letterstedt (Now Vicomtesse Moutmort) v. Broers & Anor [1884] 9 AC 371 ***(refd)***
Moran v. Place [1896] 214 ***(refd)***
P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors [1961] 1 LNS 78 HC ***(refd)***
D *SMKR Meyappa Chetty v. SN Supramaniam Chetty [1957] 1 WLR 157* ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, ss. 16, 33, 34, 60
E Public Trust Corporation Act 1995, ss. 13(1), 14(2), (3)
Rules of High Court 1980, O. 71 r. 37(7)

For the appellant - Cyrus Das (Jeremy Lee & Roy Vallipuram with him); M/s Roy & Assocs
For the respondent - Dato SC Loh (Mark Lau & Kelvin Seet with him);
F *M/s Sreenevasan Young*
Watching brief for Damayanti, Tilaklal & Jogesh Doshi; Khabir Dhillon

Reported by Suhainah Wahiduddin

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JUDGMENT

Abdull Hamid Embong FCJ:

[1] The background to this appeal is best understood by the
H following chronology of events which spanned over 20 years:

01.07.1991 Kantilal Prabhulal Doshi ("the deceased") died leaving a will in which his wife, Damayanti Kantilal Doshi, and his youngest son, Jogesh Kantilal Doshi
I (Jogesh) were named as executrix and executor respectively of the deceased's estate. (In this judgment we will refer to them as the then executrix and executor)

17.08.1991 The then executrix and executor then instituted Johor Bahru High Court Suit No. 22-195-1991 ("Suit No. 195") against the appellant, his wife and Overseas Industries Sdn Bhd (a company which was formed by the deceased in 1969) for *inter alia* a declaration that the appellant holds 1,475 shares in the said company in trust for the estate.

15.10.1991 Probate was granted in favour of the then executrix and executor.

17.09.1994 The appellant, his wife and Overseas Industries Sdn Bhd filed a notice of motion for an order that the grant of probate granted by the High Court to the then executrix and executor be revoked.

29.07.1995 The High Court allowed the above-mentioned application and ordered that the official administrator be appointed to administer the estate of the deceased.

The then executrix and executor appealed against that order of the High Court.

04.06.1998 The Court of Appeal affirmed the order of the High Court and the respondent (ARB) was duly appointed as the administrator of the estate pursuant to Public Trust Corporation Act 1995.

(Meanwhile, several writs of summons and originating summonses as well as originating petitions had been filed by the parties mainly regarding the issues of directorial positions and the holding of shares in Overseas Industries Sdn. Bhd.

By 28 February 2006, all the cases were consolidated and were ordered to be tried together with Suit No. 195.)

01.11.2007 A notice of caveat was entered by the appellant against the estate of the deceased *via* Probate No. 30-2007.

04.01.2008 A grant of probate was issued to ARB.

(The appellant contended that the issuance of the said grant of probate was made without any notice given to the appellant.)

05.02.2008 The appellant filed an Originating Summons No. 24-384-2008 in the High Court to have the appointment of the ARB as administrator of the estate revoked and a private trust company be appointed in the ARB's place to complete the administration of the estate.

19.03.2008 The appellant filed a summons in chambers (encl. 194) seeking to strike out the Suit No. 195 on the ground that the ARB had no *locus standi* to maintain the suit as the ARB had neither applied for nor extracted the grant of letters of administration to the estate.

27.03.2008 The ARB filed an affidavit in reply stating that they had, on 4 January 2008, extracted the grant of probate for the deceased's estate.

31.03.2008 The appellant withdrew his application in Originating Summons No. 24-384-2008 for the revocation of the appointment of the ARB as administrator of the deceased's estate.

On the same day, the appellant's summons in chambers (encl. 194) was struck out by consent. It was also ordered that "the appellant shall withdraw all the outstanding interlocutory applications in the consolidated actions" to pave the way for the Suit No. 195 and the consolidated actions to be heard.

24.06.2008 The appellant filed an Originating Summons No. 24-1970-2008 (the present action) applying for an order that the grant of probate dated 4 January 2008 to the ARB be set aside on the ground that the said probate was wrongfully and unlawfully issued for the following reasons:

(i) there was in existence a caveat entered by the appellant on 1 November 2007 on the estate; and

(ii) in any case the ARB was only entitled to letters of administration with will annexed and/or letters of administration *de bonis non* and not a grant of probate.

03.11.2008 The appellant's application was dismissed by the High Court.

20.11.2009 The appellant filed a Notice of Appeal to the Court of Appeal.

25.08.2010 The appellant's appeal was dismissed by the Court of Appeal.

24.09.2010 The appellant filed a notice of motion to the Federal Court for leave to appeal against the decision of the Court of Appeal, essentially challenging the validity of the Grant of Probate to ARB on 4 January 2008 on the same two grounds.

09.12.2010 Leave to appeal was allowed by the Federal Court on the following questions of law:

(i) Whether the ARB could petition for grant of probate under the Public Trust Corporation Act 1995 when appointed only as an administrator?

(ii) Whether a grant of probate is a nullity when a caveat against a grant was in force?

The First Question

[2] The starting point in answering this question must be s. 13(1) of the Public Trust Corporation Act 1995, the law that relates to the ARB and regulates the exercise of its functions and powers. And the sub-section states:

> 13. Grant of probate and letters of administration to corporation.
>
> (1) The Corporation may, on its own application or on the application of any other person, be granted probates of will or letters of administration by the Court.

In short, ARB may either be appointed an executor or an administrator of the estate. This distinction is important because unlike the wide powers of an executor, an administrator may only deal in the property of the deceased subject to the directions and permission of the court as laid out in s. 60 of the Probate and Administration Act 1959.

[3] The order of the Court of Appeal dated 4 June 1998 had affirmed the High Court order of 29 July 1995 in appointing the ARB as an administrator of the estate. The appellant here had in that case applied for the revocation of the probate granted to the then executrix and executor and in place to appoint the official administrator as an administrator with the will annexed. The Court of Appeal revoked the appointments of the then executrix and executor on the ground that the High Court had been right in finding that there was a sufficient cause under s. 34 Probate and Administration Act 1959 to revoke their appointments. At the High Court four of the seven complaints by the appellant were found to have been proven as sufficient cause, namely the non extraction of the grant of probate, the non ascertainment of the debts of the estate and of the residue available for distribution, the failure of the executors to render accounts and lastly the failure to take steps to prevent dissipation of the assets [the reported judgment of the Court of Appeal is at *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1998] 4 CLJ 81].

[4] There had been great friction and hostility between the then executrix and executor and the appellant resulting in various court actions but as correctly observed by the Court of Appeal, relying on a passage of Lord Blackburn in *Letterstedt (Now Vicomtesse Moutmort) v Broers & Anor* [1884] 9 AC 371, that factor should not "itself (be) a reason for the removal of a trustees (of a trust estate)." In spite of the strong objection by the then executrix and executor, the Court of Appeal proceeded to appoint the ARB as the administrator of the estate, in their place.

[5] The ARB however did not implement its appointment or to seek for a transfer of the estate from the then executrix and executor to itself as allowed under s. 14(2) of Public Trust Corporation Act 1995 which states:

> (2) Any executor who has obtained probate or any administrator who has obtained letters of administration or any trustee may, with the sanction of the Court and after giving such notice to the persons beneficially interested as the Court may direct, and notwithstanding that he has acted in the administration of the deceased's estate of the trust property, transfer such estate or trust property to the Corporation for administration either solely or jointly with the continuing executors, administrators or trustees, if any.

(3) The order of the Court sanctioning such transfer shall, subject to this Act, give to the Corporation all the powers of the executor, administrator or trustee.

[6] Instead, after ten years of inaction the ARB on 4 January 2008 applied to the court to obtain a Grant of Probate over the estate.

[7] That Grant is now reproduced. It states:

DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU GERAN PROBET NO: 32-194-2007

DALAM HARTA PUSAKA
KANTILAL PRABHULAL DOSHI, SIMATI
NO. KP: 7307548

GERAN PROBET

KETAHUILAH bahawa pada tarikh yang tertulis di bawah ini Wasiat dan Testamin Terakhir oleh Mendiang Kantilal Prabhulal Doshi, si mati yang telah mati pada 1hb Julai, 1991 dengan meninggalkan harta yang terletak di dalam bidang kuasa Mahkamah ini, telah dibuktikan di hadapan ini, dan bahawa Pentadbiran bagi semua dan tiap-tiap satu harta alih dan tak alih simati yang terletak dalam bidang kuasa itu telah diberikan oleh Mahkamah ini kepada AMANAH RAYA BERHAD (344986-V) sebagai Pentadbir yang diberikan oleh Mahkamah Tinggi di Johor Bahru melalui Usul Pemula No. 25-32-1994 bertarikh 29.07.1995 dan disahkan oleh Perintah Mahkamah Rayuan Sivil No. J-02-584 Tahun 1995 bertarikh 4.6.1998 yang menggugurkan Damayanti Kantilal Doshi dan Jogesh Kantilal Doshi sebagai wasi dan melantik Amanah Raya Berhad sebagai Pentadbir Amanah Raya Berhad setelah mengangkat sumpah untuk mentadbirkannya dengan sempurna dan jujur dengan membayar hutang-hutang simati yang patut dan legasi-legasi yang terkandung dalam Wasiatnya dan memberi keterangan yang adil dan benar tentangnya pada bila-bila masa dikehendaki mengikut undang-undang.

Bertarikh 04hb. Januari, 2008

...
Abdul Ghapar bin Ab Latif
Timbalan Pendaftar
Mahkamah Tinggi
Johor Bahru

Tarikh Keluaran 1 Feb, 2008

[8] For the appellant, it was argued that this grant of probate was itself a wrong application. The ARB should instead have applied for a grant of letters of administration since the Court of Appeal had appointed it only as an administrator not an executor, as seen from that part of the order which reads "Dan adalah diperintahkan selanjutnya bahawa Amanah Raya Berhad dilantik sebagai Pentadbir Pusaka bagi mendiang Kantilal Prabahulal Doshi." Learned counsel for the appellant also submitted that the ARB, being who it is, should know the difference between their entitlements to a grant of letters of administration instead of a grant of probate.

[9] Learned counsel for the respondent submitted that the substance rather than form of the grant of probate should be looked at to determine if a probate was actually granted. The Court of Appeal agreed with this approach when it made a finding that since the respondent was appointed as an administrator, "it cannot be said that there had in fact actually been a grant of probate to the respondent". The Court of Appeal found that in substance the grant of probate was actually a grant of letters of administration with a will annexed; pursuant to the order of the High Court dated 29 July 1995, made under s. 16 of the Probate and Administration Act 1959.

[10] The Court of Appeal made the following findings on this issue:

> What is patently clear from the "Geran Probet" is that other than the case number and the heading/title, nowhere in the body of the "Geran" is the appointment of the Respondent as an executor mentioned. On the contrary, the "Geran" makes it clear that it is granted pursuant to the High Court order as affirmed by the Court of Appeal, appointing the Respondent as "Pentadbir" or Administrator. In the circumstances, it cannot be said that there had in fact been a grant of probate to the Respondent.

[11] With respect we have to depart from this reasoning of the Court of Appeal. In our view, the application for the Grant of Probate was made by the ARB acting pursuant to its powers under s. 13(1) of the Public Trust Corporation Act. This may be discerned from para. 5 of its affidavit supporting the petition. It states:

> 5. Pempetisyen memfailkan permohonan berasaskan Usul Pemula No. 25-32-1994 bertarikh 29 Julai, 1995 yang dikeluarkan oleh Mahkamah Tinggi Malaya di Johor Bahru

dan Perintah Mahkamah Rayuan Rayuan Sivil No: J-02-584 Tahun 1995 bertarikh 4hb. Jun, 1998, dan permohonan ini dibuat menurut Seksyen 13, Akta Perbadanan Amanah Raya 1995.

[12] The Court of Appeal had on 4 June 1998 appointed ARB as an administrator. The ARB should have applied for a grant of administration instead, and not as it did here for a grant of probate.

[13] As such we are in agreement with the submission of the appellant that the grant of probate in this instance had been in breach of the order of the Court of Appeal and would declare that grant to be a nullity. An act done in disobedience of a court order as happened here, is an invalid act; and it could not affect any change in the rights and liabilities of others (see *Clarke & Ors v. Chadburn and Ors* [1985] 1 All ER 211). It is also trite that any order made by a court of unlimited jurisdiction has to be obeyed by a person against whom it was made unless it had been set aside.

In concluding that "other than the case number, nowhere in the body of the 'Geran' is the appointment of the respondent as an executor mentioned," the Court of Appeal seemingly missed two important factors in coming to its conclusion. First, the application by ARB is a specific application for a Grant of Probate entitled "Petisyen untuk Geran Probet No. 32-194-Tahun 2007" and secondly as shown above, the Grant itself is duly headed "Geran Probet". To us, in this instance, the clear intent and form cannot be ignored.

[14] We are therefore unable to agree with the Court of Appeal in its finding that the grant was substantially a grant of letters of administration with will annexed since the respondent was named therein as a pentadbir or administrator. It should be recalled that the ARB's initial appointment as an administrator by the High Court was pursuant to an application by the appellant to revoke the appointment of the then executrix and executor pursuant to s. 34 of the Probate and Administration Act 1959.

The Second Question

[15] The appellant had entered a caveat on 1 November 2007. The grant of probate made on 4 January 2008 was thus, made during the existence of the caveat. It was submitted by appellant's

counsel that since there was no notice to the caveator, it was thus in defiance of the caveat and so would make that grant a nullity.

[16] The respondent's counsel conversely argued that when the caveat was lodged in November 2007, the ARB had already been appointed as an administrator by order of the High Court dated 29 July 1995 and affirmed by the Court of Appeal on 4 June 1998. The lodging of the caveat on 1 November 2007 was thus far too late to have any legal effect. It was further submitted that the caveat had no effect because, firstly, in a letter from the Principal Registry dated 12 December 2007, to the Registrar of the court at Johor Bahru in connection with ARB's application for a grant of probate, no mention was made of that caveat, and secondly, by letter dated 1 December 2010 the Principal Registry confirmed that there was no record of the respondent's caveat in the index of caveats. The Court of Appeal in its judgment had agreed with the respondent's stand that the caveat lodged was too late and thus "akin to shutting the stable doors after the horse has bolted". We disagree. Our answer to this argument appears later in this judgment.

[17] With respect, we are in agreement with the submission of the appellant that the Court of Appeal had failed to appreciate the distinction between an appointment and a grant. It is the grant that clothes the personal representative with a title upon its issue by the Registry under the seal of court. The administrator derives his title from the grant and cannot act until then. We agree with what Ismail Khan J said in *P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors* [1961] 1 LNS 78 that "it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with the representative character and to have acquired a title to the estate". The learned judge in that case also followed Lord Parker's observation in the case of *SMKR Meyappa Chetty v. SN Supramaniam Chetty* [1957] 1 WLR 157, that:

> An administrator on the other hand derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled.

[18] The correct position is that a valid caveat was in force before the grant and to ignore the caveat was clearly wrong.

[19] The legal effect of a caveat is actually a notice to the court not to allow proceedings to be taken without notice to the caveator, and not merely as a notice to the caveator as was wrongly held by the Court of Appeal. *Tristram* and *Coote's Probate Practice* (21st edn) defines a caveat as "a notice in writing lodged in the principal probate registry, or in a district probate registry, that **no grant is to be sealed** in the estate of the deceased named therein without notice to the party who has entered the caveat". (emphasis added)

[20] A caveat is thus not merely a notice to a particular person; it is a general notice to the court not to allow proceedings to be taken without notice to the caveator.

[21] This absolute bar on any proceedings in the face of the caveat is emphasized by O. 71 r. 37(7) Rules of High Court (RHC) 1980 which in peremptory language states that "The Registrar must not make any grant if he has knowledge of an effective caveat in respect thereof". The qualification "must" in that rule is in our view even stronger than a "shall" stipulation. The Indian Supreme Court in *L Narain v. Union of India* AIR [1976] SC 715 had said so in this passage which we now adopt:

> If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further.

[22] Section 33 of the Probate and Administration Act 1959 also declares that "no representation shall be granted without notice to the caveator and after entry of any such caveat no representation shall be made until the caveator has been given opportunity to contest the right of any petitioner to representation."

[23] Long ago in *Moran v. Place* [1896] 214 (Court of Appeal, Probate Division) proclaimed this legal effect of a caveat in this passage from the judgment of Lindley J:

> A caveat is not a notice to any opponent in particular. It is a notice to the registrar or officer of the Court not to let anything be done by anybody in the matter of the will, or the goods of the deceased, without notice to the person who lodges the caveat.

[24] From the above principles and statements we would therefore hold that a grant made in defiance of a caveat would be a nullity. And in answer to the respondents' argument, we say

A that this nullity will not be affected even by a mistake of the court registry. As observed by Eveleigh LJ in *Aly and Another v. Aly* [1984] 128 Sol J 65:

> it did not make sense that the defendant, who had done everything required of him by the rule, should be penalised for something not done in time by the court.

B

And in *Kok Song Kong v. BSP Co Sdn Bhd* [1988] 1 LNS 31, by Godfrey J, with whom we agree, said that:

C

> Where the rights of a party are threatened by an act or default of an officer of the court, the court clearly has such a power to correct the matter.

[25] It would be most harsh and unfair if the appellant, who had done all he could to get the protection of the law, is unable to obtain that protection just because the Principal Registry overlooked the caveat. We need also mention that under O. 71 r. 37(b) of the RHC the Registrar at the Principal Registry is duty bound to maintain an index of all caveats entered in all Registries.

D

E **[26]** It was not in dispute that the appellant did lodge a caveat on 1 November 2007 ie, prior to the grant of probate made to ARB on 4 January 2008. It was still in force at the latter date. A notice to the court of his right has thus been seriously made. Why should he be now deprived to contest his right by a mistake of the court registry?

F

[27] In our view the grant here should have been set aside and the matter corrected pursuant to the procedures set out under order O. 71 r. 37 RHC since clearly here a caveat was in existence.

G

[28] For these reasons, the answer to question 1 is in the negative and to question 2 is in the affirmative. The appeal is therefore allowed with costs.

H

I